U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALLACE F. BALLOW and DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT, Phoenix, AZ

Docket No. 03-471; Submitted on the Record;
Issued June 23, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant's claim for compensation is barred by the time limitation provisions of the Federal Employees' Compensation Act.

On August 29, 2001 appellant, than a 62-year old forestry technician, fire suppression technician and firefighter, filed an occupational claim alleging that he became aware that he had a hearing loss on March 17, 1973 and that he became aware that it was work related on March 8, 2000. He stated that his hearing loss occurred from 1973 to 1990 and resulted from the use of chain saws at work. Appellant stated that he was last exposed to chain saw operation noise in the 1990 fire season and retired from his job in 1991. He stated that after he retired he began seeing doctors to determine the amount of the hearing loss and the probable causes of it.

In the year 2000, appellant's hearing worsened and he saw Dr. Robert A. Arbon, a Board-certified otolaryngologist, who informed him that his hearing loss was related to his employment using the chain saws. Appellant submitted a medical report from Dr. Arbon dated August 8, 2000 indicating that he was deaf in his left ear and had used chain saws for several years at work. Appellant also submitted the results of an audiogram dated August 17, 2000.

By decision dated January 8, 2002, the Office of Workers' Compensation Programs denied the claim, stating that the evidence of record did not establish that appellant met the requirements for filing a timely claim under Act.

By letter dated January 22, 2002, appellant requested an oral hearing before an Office hearing representative which was held on August 1, 2002. At the hearing, appellant testified that from 1973 to 1991, when he retired, he realized that he had a gradual hearing loss but did not tell his supervisor because it was not bothering him on the job, although he stated that his supervisor knew he had trouble hearing in his left ear. He did not give his supervisor any written notice of the problem.

Appellant testified that he sustained a traumatic injury at work using a chain binder on August 21, 1962 which consisted of a fracture and severe damage to his cheekbone, face and jaw. Appellant contended that when he saw a doctor in 1991 for his hearing loss, the doctor attributed it to the 1962 traumatic injury. He testified that he filed a claim at the time on form CA-1 attributing his hearing loss to the 1962 injury. That claim, however, is not in the record. Appellant testified that he also began to seek the services of an attorney at that time. He did not realize that his hearing loss was related to his employment until the year 2000, when he saw Dr. Arbon.

Appellant submitted a physical examination performed by the employing establishment dated March 23, 1973, which indicated that he had trouble hearing in his left ear. He also submitted a letter dated January 3, 1992 from the employing establishment to the Office, which stated that on January 3, 1992 appellant submitted Forms CA-1 and CA-2a, with supporting medical documentation for an injury occurring on August 21, 1962. The letter does not describe the precise nature of the claim.

By decision dated November 13, 2002, the Office hearing representative affirmed the Office's January 8, 2002 decision.

The Board finds that the appellant's claim filed on August 29, 2001 is timely.

Under the Act,[1] as amended in 1974, a claimant has three years to file a claim for compensation.[2] In a case of occupational disease, the Board has held that the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware, of a possible relationship between his condition and his employment. When an employee becomes aware or reasonably should have been aware that he has a condition which has been adversely affected by factors of his federal employment, such awareness is competent to start the limitation period even though he does not know the nature of the impairment or whether the ultimate result of such affect would be temporary or permanent.[3] Where the employee continues in the same employment after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.[4] Section 8122(b) provides that, in latent disability cases, the time limitation does not begin to run until the claimant is aware or by the exercise of reasonable diligence, should have been aware, of the causal relationship between his employment and the compensable disability.[5] Even if the claim is not filed within the three year period, it may be regarded as timely under section 8122(a)(1) if appellant's immediate supervisor

[1] 5 U.S.C. § 8122.

[2] *Duet Brinson*, 52 ECAB 168 (2000); *William F. Dorson*, 47 ECAB 253, 257 (1995); *see* 20 C.F.R. § 10.101(b).

[3] *Larry E. Young*, 52 ECAB 264 (2001); *Duet Brinson*, *supra* note 2.

[4] *See Larry E. Young*, *supra* note 3; *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

[5] 5 U .S.C. § 8122(b); *Bennie L. McDonald*, 49 ECAB 509, 514 (1998).

had actual knowledge of his alleged employment-related injury within 30 days such that the immediate superior was put reasonably on notice of an on-the-job injury or death.[6]

In this case, appellant testified that he was not aware that his hearing loss was an occupational disease resulting from the noise of the chain saws he used at work until August 8, 2000, when he saw Dr. Arbon, who informed him that his hearing loss was related to that noise. Appellant testified that he saw Dr. Arbon at that time because, that is when his hearing worsened. Although appellant testified that in 1991 he believed his hearing loss was attributable to his 1962 traumatic injury at work because that is what a doctor he saw at the time told him, a hearing loss resulting from a traumatic injury is not the same claim as a hearing loss resulting from occupational exposure to noise. Appellant's claim for a traumatic injury resulting from a hearing loss, which the Office hearing representative suggested was identified as No. 130169348, is not in the record. While the January 3, 1992 letter from the employing establishment documented that appellant filed a Form CA-1 at that time, it did not specify the type of claim appellant filed. The record does not indicate whether the claim was accepted or whether it was determined that appellant's hearing loss was ratable.

The record shows that appellant first had knowledge that his hearing loss resulted from his exposure to noise at work on August 8, 2000, when Dr. Arbon so informed him and that appellant filed his hearing loss claim for an occupational disease on August 29, 2001. Contrary to the Office's finding, appellant could not have reasonably been aware his hearing loss was related to occupational exposure in 1991 when he retired because his doctor at the time told him the hearing loss was due to his traumatic injury. A traumatic injury and an occupational disease are significantly different so that one could not reasonably expect appellant to be aware that because his hearing loss resulted from a traumatic injury, it must also have resulted from occupational exposure. On August 8, 2002 Dr. Arbon informed appellant that his hearing loss was related to occupational exposure and appellant filed his claim for a hearing loss due to an occupational disease soon after Dr. Arbon informed him. It was reasonable for appellant to have filed an occupational claim for his hearing loss at that time. Since the record establishes that appellant first had knowledge that his hearing loss was an occupational disease resulting from exposure to noise at work on August 8, 2000, and this was the first time he reasonably could have been aware that his hearing loss was due to occupational exposure, his claim filed on August 29, 2001, within three years of his date of awareness, is timely. The case must, therefore, be remanded for the Office to address the merits of the claim. After any further development that it deems necessary, the Office should issue a *de novo* decision.

[6] *Duet Brinson*, *supra* note 2; *Delmont L. Thompson*, 51 ECAB 155, 156 (1999).

The November 13 and January 8, 2002 decisions of the Office of Workers' Compensation Programs are hereby reversed and the case remanded for further action consistent with this decision.

Dated, Washington, DC
June 23, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member